

# Justice Brennan and the Foundations of Human Rights Federalism

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*In a well-known and widely cited 1977 law review article, Justice William J. Brennan called on state courts to “step into the breach” and use their authority as independent interpreters of state constitutions to continue on the state level the expansion of individual liberties begun on the national level by the Warren Court. Justice Brennan was right about the importance of independent state constitutional law, but he was wrong about the reason. The benefits of independent state constitutional law have little to do with expanding human rights and everything to do with federalism. The confusion is understandable; both individual rights and federalism protect liberty, but they do so by very different mechanisms, and those mechanisms can at times operate at cross-purposes. Federalism protects liberty not by offering an opportunity for the continuous expansion of human rights protections, but by creating a system of dual agency in which the people appoint two agents, one state and one federal, to monitor and check the abuses and errors of the other. Nothing in that system inherently requires the expansion of rights on the state level, and it can just as easily support their contraction. The value of independent state constitutional law lies in its availability as a tool by which state agents can protect the people’s interests by staking out and institutionalizing positions opposing those taken by the national government, whatever they may be. In the arena of rights, it is thus to be expected—and it is observed—that the state and national governments will sometimes agree and sometimes disagree about the appropriate scope of protection to be afforded various human rights, and that disagreement may manifest itself in a competitive struggle in which each level attempts to advance its own view at the expense of the other.*

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## TABLE OF CONTENTS

I.	INTRODUCTION.....	356
II.	BRENNAN’S ARTICLE AND ITS IMPACT.....	359
	A. <i>The Context</i> .....	359
	B. <i>Brennan’s Argument</i> .....	361
	C. <i>The Article’s Impact</i> .....	362
III.	PROBLEMS IN THE AFTERMATH OF BRENNAN’S ARTICLE: CONTRADICTIONS OF THEORY AND PRACTICE .....	366
	A. <i>The Methodology Wars</i> .....	366
	B. <i>The Upshot: Little Change in Judicial Practice</i> .....	371
IV.	SUBNATIONAL CONSTITUTIONAL LAW AND RIGHTS FEDERALISM .....	374
	A. <i>Basic Principles of Federalism</i> .....	374
	B. <i>State Constitutions in a Federal System</i> .....	376
	C. <i>Human Rights Federalism</i> .....	379
V.	CONCLUSION.....	384

## I. INTRODUCTION

In May of 1976, in the unlikely venue of the Playboy Resort Hotel at Great Gorge, New Jersey, Associate Justice William J. Brennan delivered a speech at an event held by the New Jersey Bar Association in honor of Brennan’s seventieth birthday and twentieth year on the U.S. Supreme Court bench.<sup>1</sup> The speech, published the following year in the *Harvard Law Review*,<sup>2</sup> quickly became, according to his biographers, “the most famous and widely quoted of his entire career.”<sup>3</sup> Brennan’s topic was the protection for individual rights contained in American state constitutions.<sup>4</sup> The U.S. Bill of Rights, Brennan argued, is a powerful protector of individual liberty, but it is not the only source of protection. State constitutions, he observed, also protect liberty through their own bills of rights.<sup>5</sup> Because the constitutional system of federalism makes states independent sovereigns, Brennan went on, state constitutional protections for human rights are independent of those provided by the U.S. Constitution.<sup>6</sup> This means in turn that state constitutions may—and in Brennan’s opinion should—offer greater security for individual rights than does the U.S. Constitution, at least as construed by the Supreme Court in a

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<sup>1</sup> SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 434–36 (2010).

<sup>2</sup> William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

<sup>3</sup> STERN & WERMIEL, *supra* note 1, at 436.

<sup>4</sup> Brennan, *supra* note 2, at 489.

<sup>5</sup> *Id.* at 495.

<sup>6</sup> *Id.* at 491, 502.

series of then-recent cases interpreting federal rights in ways that Brennan found unduly stingy.<sup>7</sup> State courts, Brennan intimated, should thus look to their own bills of rights to continue the Warren Court's expansion of individual liberty, of which Brennan had been a key architect.<sup>8</sup>

Brennan's plea did not fall on deaf ears. In the quarter-century preceding publication of the article, state courts around the nation had issued fewer than fifty rulings in which they construed state constitutions to be more protective of individual rights than the U.S. Constitution—about two per year.<sup>9</sup> In the decade following Brennan's article, the pace of such rulings increased at least tenfold.<sup>10</sup> Within just eight years, Brennan's article had shot up the list of most-cited law review articles to the top twenty of all time, taking its place alongside many articles that had been in circulation much longer.<sup>11</sup>

Nevertheless, reaction to Brennan's article was far from uniformly positive. On the bench, Brennan had long been associated with nationalistic, centralizing rulings in which federal law had been applied unsentimentally to override state policy decisions of all kinds—policies on racial segregation,<sup>12</sup> electoral structures,<sup>13</sup> the death penalty,<sup>14</sup> obscenity,<sup>15</sup> religious instruction in schools,<sup>16</sup> and many others. Critics deemed Brennan's newfound interest in federalism opportunistic, and characterized his interest in state constitutions as arising from a purely instrumental desire to harness them in an ideological war that he had begun to lose at the national level.<sup>17</sup>

In this respect, Brennan's article raised more questions than it answered. Brennan urged state courts to adjudicate cases under human rights provisions of state constitutions, but if his challenge was more than what his critics claimed—if it was really a principled appeal to constitutional rules of federalism rather than an opportunistic mobilization of ideological allies—then

<sup>7</sup> *Id.* at 495–98.

<sup>8</sup> *Id.* at 502–03.

<sup>9</sup> GARDNER, *supra* note \*, at 40.

<sup>10</sup> *Id.* at 40–41. One estimate places the increase at more like 35-fold. Sol Wachtler, *Our Constitutions—Alive and Well*, 61 ST. JOHN'S L. REV. 381, 397 (1987).

<sup>11</sup> Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CALIF. L. REV. 1540, 1550 (1985).

<sup>12</sup> *Cooper v. Aaron*, 358 U.S. 1, 4 (1958).

<sup>13</sup> *Baker v. Carr*, 369 U.S. 186, 187–88 (1962).

<sup>14</sup> *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (*per curiam*).

<sup>15</sup> *Miller v. California*, 413 U.S. 15, 47–48 (1973) (Brennan, J., dissenting).

<sup>16</sup> *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

<sup>17</sup> Ronald K.L. Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1, 2 (1981); Peter J. Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 SYRACUSE L. REV. 731, 783–84 (1982); Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429, 432–33 (1988); Earl M. Maltz, *The Political Dynamic of the “New Judicial Federalism,”* 2 EMERGING ISSUES ST. CONST. L. 233, 235–36 (1989) [hereinafter Maltz, *Political Dynamic*]; see also Robert F. Williams, *Justice Brennan, the New Jersey Supreme Court, and State Constitutions: The Evolution of a State Constitutional Consciousness*, 29 RUTGERS L.J. 763, 767–71 (1998) (reviewing critiques).

state courts would need a sound jurisprudential basis for heeding Brennan's call. How should state constitutional rights provisions be interpreted? On what basis ought they to be interpreted to have a different—and more generous—meaning than the U.S. Constitution? Answering these questions turned out to be more difficult than Brennan seemed to anticipate, and in the end only a handful of state supreme courts showed an interest in unraveling the knotty jurisprudential issues.

Finally, although the article provoked a brief flurry of rights-protective state constitutional rulings, for the most part state courts showed a marked tendency even after the article's publication to issue individual rights rulings by resting them solely on the U.S. Constitution without—contrary to Brennan's urging—giving any consideration at all to state constitutional protections.<sup>18</sup> In those cases in which state courts looked to the state constitution at all, as Brennan had recommended, they tended over time to construe their constitutions in conformity with the U.S. Constitution in the great majority of cases.<sup>19</sup> In the end, although Brennan's article did much to excite the appetite of rights liberals, it had little long-term impact on the practices of state courts.

This Symposium offers a welcome occasion to reflect on why this might be so. I argue here that Brennan's pitch failed to gain much long-term traction among state judges not because it rested on an instrumental view of state constitutional rights provisions, but because it rested on an incomplete conception of federalism. Brennan was right that federalism makes state constitutions jurisprudentially independent from the U.S. Constitution, and that state courts may exercise this independence so as to read state constitutional rights more generously than their federal counterparts. In this respect he was indeed a shrewd analyst of the workings of the federal system. Brennan's mistake, however, was that he failed to locate the federalism of constitutional rights within the much broader context of the federalism of intergovernmental relations, a system of long-term, often shifting power relationships created and structured by the U.S. Constitution. When properly contextualized, human rights federalism can be better understood as only one of many arenas in which state and national governments may contest for power, and the deployment of rights as only one of many tools that states may wield against the federal government to get their way in intergovernmental policy disputes. This, in my view, helps not only to resolve the puzzling questions of interpretation that Brennan's notion of rights federalism raised, but also to explain why Brennan's account has never provided an accurate description of the actual practices of state courts.

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<sup>18</sup> Michael Esler, *State Supreme Court Commitment to State Law*, 78 JUDICATURE 25, 28 (1994).

<sup>19</sup> Barry Latzer, *The Hidden Conservatism of the State Court "Revolution,"* 74 JUDICATURE 190, 192–93 (1991); James N.G. Cauthen, *Expanding Rights Under State Constitutions: A Quantitative Appraisal*, 63 ALB. L. REV. 1183, 1188 (2000).

The balance of this Article is organized as follows. Part II establishes the context in which Brennan wrote his article, and briefly reviews its argument, culminating in his famous call to state courts to “step into the breach.”<sup>20</sup> Part III discusses the jurisprudential problems that arose in the aftermath of the article, focusing on the widespread confusion that the article provoked concerning the proper methodology for interpreting state constitutional provisions. Part IV sets out an alternative view of subnational constitutional independence, grounding it in a Madisonian understanding of federalism as implementing a two-government system of dual agency, a system that is designed to produce permanent contestation between national and subnational governments. In that context, the deployment of independently interpreted constitutional rights can be better understood as merely one tool available to subnational governments in an ongoing practice of intergovernmental struggle over policy. That, in turn, explains why state courts are a priori no more likely to be inclined to prefer rights-expanding interpretations of state constitutional provisions than to prefer rights-contracting ones.<sup>21</sup> When and if state courts choose to issue rights-expanding decisions thus depends largely on how well they believe the federal government is doing its job, a judgment that in today’s world is as much about power and partisanship as it is about constitutional jurisprudence.

## II. BRENNAN’S ARTICLE AND ITS IMPACT

### A. *The Context*

Brennan wrote *State Constitutions and the Protection of Individual Rights* in 1976, at a time that we now know, in retrospect, to have been a unique moment in American constitutional history. The national government was then riding the crest of an unprecedented, forty-year expansion of its role in American life. Its success in lifting the nation out of the Great Depression, prosecuting the Second World War, and enacting a good deal of the legislative agenda of the civil rights movement conferred on the use of national power perhaps the greatest legitimacy it has ever enjoyed.<sup>22</sup> Though by 1976 the experiences of Vietnam and Watergate had complicated American feelings about national power, most in the 1970s continued to look to the national

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<sup>20</sup> Brennan, *supra* note 2, at 503.

<sup>21</sup> There is of course a practical complication imposed by the Supremacy Clause insofar as it constrains implementation of rights-contracting interpretations of state constitutions, but that is a smaller piece of the picture than it might at first seem. That issue is taken up below in Part IV.C.

<sup>22</sup> MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY & TRAGIC COMPROMISE* 110–15 (2008).

government for solutions to significant domestic problems such as environmental protection, crime, public transportation, and pension benefits.<sup>23</sup>

At the same time, federalism had been badly discredited by its association with the Southern regime of Jim Crow.<sup>24</sup> Since the end of Reconstruction, and certainly since the era of Redemption in the late nineteenth century, Southern states had successfully invoked principles of federalism as a shield to protect a form of racial apartheid that, according to C. Vann Woodward's influential account, in some ways exceeded in harshness and comprehensiveness the lived caste system of slavery that it replaced.<sup>25</sup> Southern members of Congress had long obstructed national intervention in aggressively asserted Southern "sovereignty"<sup>26</sup> or "home rule"<sup>27</sup> until the 1960s, when televised accounts of brutality toward peaceful civil rights marchers eventually made further complete obstruction politically impossible.<sup>28</sup> The prevailing view among liberals was aptly summed up in 1964 by the political scientist William Riker, who in an influential book on federalism argued, more than a little reductively, that if "one disapproves of racism, one should disapprove of federalism."<sup>29</sup>

Meanwhile, the Supreme Court had by the 1970s established individual rights as an immensely powerful tool for the deployment of national power against recalcitrant states. Because its prohibitions apply directly to the states rather than to the national government,<sup>30</sup> the Fourteenth Amendment offered the Court a mechanism for penetrating the shield that the structural protections of federalism had long provided to deviant regional behavior. *Brown v. Board of Education*, which deployed the Equal Protection Clause to dismantle segregation,<sup>31</sup> was the first great shot in this war of intergovernmental power. It was soon followed by a series of decisions under the Due Process Clause that greatly expanded the scope of the incorporation doctrine, a reading of the

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<sup>23</sup> E.g., Clean Air Act, 42 U.S.C. §§ 7401–7671q (1970); National Environmental Policy Act, Pub. L. No. 91-190, 83 Stat. 852 (1970); Organized Crime Control Act, Pub. L. No. 91-452 (1970); Urban Mass Transportation Act, Pub. L. No. 91-453, 84 Stat. 962 (1970); Clean Water Act, Pub. L. No. 92-200, 86 Stat. 816 (1972); Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 884 (1973); Employee Retirement Income Security Act, Pub. L. No. 93-406, 88 Stat. 829 (1974).

<sup>24</sup> See, e.g., WILLIAM H. RIKER, *FEDERALISM* 152–53, 155 (1964).

<sup>25</sup> C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 8, 14, 23–24, 91–92 (1955).

<sup>26</sup> ROBERT MICKEY, *PATHS OUT OF DIXIE* 5 (2015).

<sup>27</sup> WOODWARD, *supra* note 25, at 13; ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877*, at xix–xx (1988).

<sup>28</sup> TAYLOR BRANCH, *AT CANAAN'S EDGE: AMERICA IN THE KING YEARS, 1965–68*, at 54–58, 119–20, 122–23 (2006); MICKEY, *supra* note 26, at 261, 288–89, 292.

<sup>29</sup> RIKER, *supra* note 24, at 155.

<sup>30</sup> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1 (emphasis added).

<sup>31</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

Clause that understood it to include and to apply to the states most of the protections of the federal Bill of Rights.<sup>32</sup> By the 1970s, the Court had applied expansive interpretations of individual rights to invalidate state laws in sensitive areas of criminal procedure, the death penalty, and public displays of religion.<sup>33</sup> As Lucas Powe has persuasively argued, an important mission of the Warren Court can be fairly understood as dragging the South kicking and screaming into the twentieth century.<sup>34</sup>

Yet, by the early 1970s, Brennan was already worried that the Supreme Court had begun to abandon its commitment to an expansive reading of constitutional liberty. As Brennan's biographers report, "[b]y the spring of 1971, Brennan did not feel much need to suppress the frustration and anger building inside his chambers. Every new opinion seemed to confirm the fears he and his clerks shared that the Warren Court's gains had begun to slip away."<sup>35</sup>

### B. Brennan's Argument

Against this backdrop, why Brennan wrote his article as he did, and why his argument struck a chord with so many readers, becomes much easier to understand. In *State Constitutions and the Protection of Individual Rights*, Brennan argued that, notwithstanding the prominent role played by the U.S. Constitution in the protection of individual rights, in our federal system state constitutions play a similar role—they are, he observed, referring to state constitutional bills of rights, "a font of individual liberties."<sup>36</sup> The rights protections offered by state constitutions, he went on, implement "the independent protective force of state law,"<sup>37</sup> and in virtue of this independence are neither subordinate to nor mere "mirror[s] of the federal Bill of Rights."<sup>38</sup> Instead, state constitutional rights provisions have independent force, the protections of which "often extend[] beyond those required by the Supreme Court's interpretation of federal law."<sup>39</sup>

For this reason, Brennan argued, "state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution."<sup>40</sup> Instead, they must look to state constitutional rights, exercising independent

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<sup>32</sup> See, e.g., *Malloy v. Hogan*, 378 U.S. 1, 3 (1964); *Klopper v. North Carolina*, 386 U.S. 213, 222 (1967); *Duncan v. Louisiana*, 391 U.S. 145, 147–48 (1968); *Benton v. Maryland*, 395 U.S. 784, 787 (1969).

<sup>33</sup> *Duncan*, 391 U.S. 145, at 149; *Furman v. Georgia*, 408 U.S. 238, 238 (1972); *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

<sup>34</sup> LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 490–94 (2000).

<sup>35</sup> STERN & WERMIEL, *supra* note 1, at 350.

<sup>36</sup> Brennan, *supra* note 2, at 491.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 501.

<sup>39</sup> *Id.* at 491.

<sup>40</sup> *Id.*

judgment concerning their meaning, to see if they provide additional protection for individual liberty.<sup>41</sup> The need for state courts to adopt such a practice as a matter of routine, Brennan intimated, is urgent because the Supreme Court had by the mid-1970s begun to “pull back from” the aggressive enforcement of federal constitutional rights in which it had engaged throughout the 1960s.<sup>42</sup> In sum, Brennan concluded, the Supreme Court’s recent turn to the right “constitutes a clear call to state courts to step into the breach. . . . With federal scrutiny diminished, state courts must respond by increasing their own.”<sup>43</sup>

### C. *The Article’s Impact*

Justice Brennan’s challenge to state courts had an immediate effect. Some of the nation’s leading state jurists enthusiastically took up Brennan’s message, taking to the lecture circuit and the law reviews to repeat, emphasize, and refine it.<sup>44</sup> But it was on the bench, in actual decisions, that these and similarly inclined judges had the greatest impact. There they produced, with what Justice Brennan later called “marvelous enthusiasm,”<sup>45</sup> a sudden burst of independent, rights-protective rulings. Between 1950 and 1959, according to one study, a grand total of three decisions were handed down in which a state court construed its own state’s constitution to provide protection for individual rights greater than that accorded by the U.S. Constitution.<sup>46</sup> During the 1960s there were seven such rulings, followed by thirty-six more between 1970 and 1974.<sup>47</sup> From there, the pace picked up dramatically.<sup>48</sup> Between 1975 and 1979, state courts issued eighty-eight rights-expanding rulings. They issued 125 such rulings between 1980 and 1984, and fifty-two more in just two years, 1985 and 1986.<sup>49</sup> Between 1986 and 1994, state courts extended state constitutional protections another eighty-five times in the area of criminal

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<sup>41</sup> *Id.*

<sup>42</sup> Brennan, *supra* note 2, at 495.

<sup>43</sup> *Id.* at 503.

<sup>44</sup> E.g., Hans A. Linde, *First Things First: Rediscovering the States’ Bills of Rights*, 9 U. BALT. L. REV. 379, 379 (1980) [hereinafter Linde, *First*]; Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 952 (1982); Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081, 1081 (1985); Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 979–80 (1985); Ellen A. Peters, *State Constitutional Law: Federalism in the Common Law Tradition*, 84 MICH. L. REV. 583, 587–88 (1986).

<sup>45</sup> William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 549 (1986).

<sup>46</sup> Ronald K. L. Collins et al., *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 16 PUBLIUS 141, 142 (1986).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*



procedure alone.<sup>50</sup> These rulings, and subsequent ones, touched on virtually every area of constitutional liberties.

Although this trend was greeted initially by legal scholars with enthusiasm,<sup>51</sup> critical voices soon appeared. Chief among the early objections to the growing practice of independent state constitutional adjudication was the charge that such rulings were nothing more than unprincipled, result-oriented attempts to evade the force of decisions of the U.S. Supreme Court.<sup>52</sup> As one early critic put it, Justice Brennan had invited state courts to treat their state constitution as “little more than a handy grab bag filled with a bevy of clauses that may be exploited in order to circumvent disfavored United States Supreme Court decisions.”<sup>53</sup>

Nor was the public always grateful for state courts’ discovery of the rights-protective possibilities of state constitutions. During the 1980s, in a backlash against rulings of the California Supreme Court taking an expansive view of state constitutional procedural rights for those charged with crime, California voters amended the California Constitution to eliminate the state constitution’s exclusionary rule,<sup>54</sup> thereby making the California Constitution considerably more restrictive of rights than the federal Fourth Amendment. And in an incident that ushered in the modern era of bitterly contested judicial elections, California voters in 1986 turned out three sitting California Supreme Court Justices partly in reaction to their repeated invocation of the California Constitution as a basis for invalidating criminal punishments, including the death penalty.<sup>55</sup> A similar popular backlash broke out in Florida, where voters by initiative amended the Florida Constitution to require Florida courts to construe the state constitutional right against unreasonable searches and seizures no more broadly than the U.S. Supreme Court interprets the federal Fourth Amendment.<sup>56</sup>

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<sup>50</sup> James N.G. Cauthen, *State Constitutional Policymaking in Criminal Procedure: A Longitudinal Study*, 10 CRIM. JUST. POL’Y REV. 521, 529 (1999).

<sup>51</sup> For example, there was an outburst of laudatory symposia. *E.g.*, Special Section, *The Connecticut Constitution*, 15 CONN. L. REV. 7 (1982); Symposium, *The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959 (1985); Symposium, *The Revolution in State Constitutional Law*, 13 VT. L. REV. 11 (1988); Symposium, *State Constitutions in a Federal System*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 1 (1988); Symposium, *State Constitutional Jurisprudence*, 15 HAST. CONST. L.Q. 391 (1988); Symposium, *State Constitutional Law*, 64 WASH. L. REV. 5 (1989).

<sup>52</sup> Maltz, *Political Dynamic*, *supra* note 17, at 233; Galie, *supra* note 17, at 763, 769.

<sup>53</sup> Collins, *supra* note 17, at 2.

<sup>54</sup> Grover C. Trask II & Timothy J. Searight, *Proposition 8 and the Exclusionary Rule: Towards a New Balance of Defendant and Victim’s Rights*, 23 PAC. L.J. 1101, 1102 (1992).

<sup>55</sup> John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348, 349 (1987).

<sup>56</sup> FLA. CONST. art. I, § 12.

Moreover, despite the brouhaha surrounding Justice Brennan's call to arms and the various judicial and scholarly responses, the ultimate impact of his article turned out to be limited, and fleeting. With the exception of a relatively small proportion of high profile cases, written mostly by a small number of vocal judges on a few state courts, the workaday reality of state constitutional adjudication remained much the same as it had been before publication of Brennan's article. State courts may well have issued 350 rights-expanding decisions during the decade following the article's appearance,<sup>57</sup> but they also issued thousands of decisions in which they refused to construe state constitutions to provide protections for individual rights that exceeded federal minima.

Two empirical studies begin to suggest the extent of this trend. Barry Latzer's 1991 study of state constitutional criminal procedure decisions found that state courts construe their state constitutions in conformity with federal interpretations of the U.S. Constitution in about sixty-eight percent of all cases.<sup>58</sup> These results were replicated in a 2000 study by James Cauthen, which found that between 1970 and 1994 state supreme courts followed the federal analysis in sixty-nine percent of a wide variety of cases raising issues of individual liberties.<sup>59</sup> These two studies, however, very likely overstate the actual degree of independence to be found in state constitutional decision making. The Latzer study is limited to criminal procedure, the one field in which state courts have been most inclined to assert themselves, probably in part because of the high proportion of criminal cases appearing on state appellate dockets, along perhaps with a resultant sense of expertise and confidence among state judges.<sup>60</sup> The Cauthen study examines a wider range of cases, but excludes those in which the state constitution is not clearly cited as the basis for a decision issued on adequate and independent state grounds.<sup>61</sup> The study thus glosses over at the selection phase the widespread practice of state courts of failing to distinguish carefully between the state and federal constitutions, a practice that severely undermines the possibility of independent development of state constitutional law by blurring state and federal law at the outset.<sup>62</sup>

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<sup>57</sup> Wachtler, *supra* note 10, at 397.

<sup>58</sup> Latzer, *supra* note 19, at 192. See also Hugh D. Spitzer, *Which Constitution? Eleven Years of Gunwall in Washington State*, 21 SEATTLE U. L. REV. 1187, 1196–1200 (1998), which finds similar results for the Washington Supreme Court, although it is unclear whether those findings still characterize that court's more recent approach. Hugh D. Spitzer, *New Life for the "Criteria Tests" in State Constitutional Jurisprudence: "Gunwall Is Dead—Long Live Gunwall!"*, 37 RUTGERS L.J. 1169, 1169 (2006).

<sup>59</sup> Cauthen, *supra* note 19, at 1196.

<sup>60</sup> Latzer, *supra* note 19, at 191.

<sup>61</sup> Cauthen, *supra* note 19, at 1193.

<sup>62</sup> James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 785–88 (1992) [hereinafter Gardner, *Failed Discourse*].

Finally, the methodology of empirical counting of results obscures the degree to which state courts not only follow the U.S. Supreme Court in its results, but tend to appropriate, lock, stock, and barrel, the analytic frameworks, doctrinal test, and reasoning patterns of federal decisions.<sup>63</sup> The deference, that is to say, that state courts show to the U.S. Supreme Court in constitutional cases goes well beyond mere adoption of ultimate results. Even more than the empirical studies reveal, the practice of interpreting state constitutional provisions to have the same meaning as—“in lockstep with”<sup>64</sup>—parallel provisions of the U.S. Constitution remains the norm.

To be sure, state supreme courts do occasionally invoke state constitutions to issue highly rights-protective rulings in controversial, high-profile cases, the best known of which is surely a recent series of rulings concerning gay marriage.<sup>65</sup> To the extent that Brennan’s article made such rulings more likely or more palatable, it continues to have an impact. Nevertheless, high-profile, rights-protective rulings remain the exception, and it would not be going too far to suggest that the field of state constitutional rights today can be characterized as a dual regime in which widespread, transgovernmental consensus on a great majority of settled issues exists side-by-side with a contrariety of views on a small number of newly emerging, socially salient issues.<sup>66</sup>

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<sup>63</sup> Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 186–88 (1984) [hereinafter Linde, *E Pluribus*]; GARDNER, *supra* note \*, at 6–11.

<sup>64</sup> For an overview and critique of the practice of lockstep interpretation, see generally ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 193–232 (2009).

<sup>65</sup> *Baehr v. Lewin*, 852 P.2d 44, 63 (Haw. 1993); *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999); *Goodridge v. Dep’t. of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003); *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006); *In re Marriage Cases*, 183 P.3d 384, 399 (2008); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 415 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 872 (Iowa 2009). Other high-profile state constitutional cases include cases on education financing, for example, *Robinson v. Cahill*, 303 A.2d 273, 277 (N.J. 1973); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 393 (Tex. 1989); *Sheff v. O’Neill*, 678 A.2d 1267, 1271 (Conn. 1996); and, more recently, voter ID. *Weinschenk v. State*, 203 S.W.3d 201, 204 (Mo. 2006).

<sup>66</sup> For an elaboration of such a theory, see generally Lawrence G. Sager, *Cool Federalism and the Life Cycle of Moral Progress*, in *NEW FRONTIERS OF STATE CONSTITUTIONAL LAW: DUAL ENFORCEMENT OF NORMS* (James A. Gardner & Jim Rossi eds., 2011). Justin Long calls the practice of independent state constitutionalism “intermittent.” Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 41 (2006).

### III. PROBLEMS IN THE AFTERMATH OF BRENNAN'S ARTICLE: CONTRADICTIONS OF THEORY AND PRACTICE

#### A. *The Methodology Wars*

One undeniable impact of Justice Brennan's article was its instantaneous creation of a demand for a theory both to justify its prescriptions and to guide their application. To refute the critique of Brennan's call to action as opportunistic and ideological, supporters of state constitutional activism needed to explain the principles on which Brennan's argument rested. In particular, they needed to explain why, how, and in what circumstances state constitutions could legitimately be interpreted to provide more expansive protection for human rights than the U.S. Constitution. This proved considerably more difficult—and contentious—than expected.

Among judicial and academic commentators, one point of agreement quickly emerged: the practice of state constitutional interpretation most commonly used by state courts was illegitimate—namely, the more or less automatic interpretation of state constitutional provisions to mean the same thing as roughly corresponding provisions of the U.S. Constitution.<sup>67</sup> This practice, soon pejoratively labeled “lockstep interpretation,”<sup>68</sup> was not only deemed improper, but indeed reviled as the very model of what a coherent practice of state constitutional interpretation must strive to avoid.

Courts practicing lockstep interpretation tended to justify it in terms of the desirability of uniformity in state and federal constitutional law. As the Oregon Supreme Court said in one well-known case:

There are good reasons why state courts should follow the decisions of the Supreme Court of the United States . . . .

The law of search and seizure is badly in need of simplification for law enforcement personnel, lawyers and judges . . . .

. . . While [the exclusionary] rule is in effect, . . . it is important, for the guidance of law officers, that the rule be as clear and simple as may be reasonably possible, consistent with the constitutional rights of the individual.

. . . Not adopting the [federal] rule . . . would add further confusion in that there would then be an “Oregon rule” and a “federal rule.” Federal and

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<sup>67</sup> Linde, *First, supra* note 44, at 382–83; Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 356 (1984); Ronald K.L. Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 TEX. L. REV. 1095, 1113–15 (1985). *But see* Earl M. Maltz, *Lockstep Analysis and the Concept of Federalism*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 99 (1988) [hereinafter Maltz, *Lockstep*].

<sup>68</sup> One of the earliest uses of the term to describe this phenomenon appears to be Maltz, *Lockstep, supra* note 67, at 99.

state law officers frequently work together and in many instances do not know whether their efforts will result in a federal or a state prosecution or both. In these instances two different rules would cause confusion.<sup>69</sup>

Critics of lockstep interpretation argued, in contrast, that a judicial yearning for simplicity and uniformity in constitutional law could not legitimately serve as the basis for construing a state constitution.<sup>70</sup> To follow blindly decisions of the U.S. Supreme Court when interpreting provisions of the state constitution was, critics argued, to accord federal rulings a “presumption of correctness” to which they were not entitled.<sup>71</sup>

At the same time, critics of lockstep interpretation also agreed that its opposite—the interpretation of state constitutions to mean something different from the U.S. Constitution—is equally illegitimate when it rests on nothing more than mere disagreement with the way in which federal courts construe similar provisions of the U.S. Constitution.<sup>72</sup> To reject federal constitutional doctrine because it seems objectionable was said to be just as bad as adopting it because it seems familiar or agreeable.<sup>73</sup> Both approaches rest on the same fundamental conceptual error: treating state constitutions as though they are little more than forums for responding to, or expressing approval or disapproval of, developments in federal constitutional doctrine. On this view, lockstep and rejectionist approaches to state constitutional interpretation share the common defect of failing to accord state constitutions the legal and institutional autonomy with which principles of federalism and state sovereignty invest them.<sup>74</sup> In using these methods, state courts improperly respond to federal constitutional doctrine when they should be engaging the state constitution on its own terms, as an independent object of legal interpretation.<sup>75</sup>

Beyond these points concerning how *not* to proceed, however, agreement broke down. Jurists and scholars quickly divided into two vigorously disagreeing camps. One group embraced what is now known as the “primacy”

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<sup>69</sup> *State v. Florance*, 527 P.2d 1202, 1209 (Or. 1974). While uniformity may be especially desirable in areas such as criminal procedure, where state and local law enforcement officers may need to exercise street-level discretion in ways that conform to both state and national constitutional constraints, the impulse toward uniformity has not been confined to such areas. As the Georgia Supreme Court said of its decision to follow federal rulings when construing the dimensions of the right to an education under the Georgia Constitution, “[c]onsistency in constitutional adjudication, though not demanded, is preferred.” *McDaniel v. Thomas*, 285 S.E.2d 156, 167 (Ga. 1981).

<sup>70</sup> *See, e.g.*, Williams, *supra* note 67, at 356.

<sup>71</sup> *Id.*

<sup>72</sup> *See supra* note 17 and accompanying text.

<sup>73</sup> Collins, *supra* note 17, at 5–9.

<sup>74</sup> Williams, *supra* note 67, at 356; Linde, *E Pluribus*, *supra* note 63, at 199; G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 182 (1998).

<sup>75</sup> Linde, *First*, *supra* note 44, at 379; Linde, *E Pluribus*, *supra* note 63, at 179; Williams, *supra* note 67, at 358.

approach.<sup>76</sup> According to this view, state courts should approach problems of state constitutional interpretation just as federal courts approach interpretational problems under the U.S. Constitution—that is, they should treat state constitutions as free-standing, wholly independent sources of positive constitutional law.<sup>77</sup> This means that state courts should interpret state constitutions by bringing to bear all the traditional tools of constitutional analysis: text, structure, history, controlling state precedent, and the values of the state polity.<sup>78</sup> This analysis should be performed, moreover, without resort to analogous rulings by federal or other state courts except for the limited purpose of providing persuasive guidance.

The other main position, often called the “interstitial” or “supplemental” approach, holds that federal constitutional questions should take pride of place, and that state courts should turn to the state constitution only after it becomes apparent that the United States Constitution provides inadequate protection for the civil liberties at issue.<sup>79</sup> Upon making such a determination, the state court should then examine the state constitution to determine whether it provides the additional increment of protection.<sup>80</sup> This approach is usually associated with a methodology of state constitutional interpretation, often labeled the “criteria” approach, which directs state courts to compare the state constitutional provision at issue to its cognate provision in the U.S. Constitution, and to construe it to have a different meaning from its federal counterpart only if some objective indicium supports the divergent interpretation.<sup>81</sup> The indicia sufficient to support a divergent interpretation are typically said to include differences in the constitutional text, structure, or history; differences in controlling state precedent; and differences in the concerns or values of the local populace.<sup>82</sup>

Both of these positions, however, suffer from significant theoretical flaws, which were quickly pointed out by their opponents. Proponents of the primacy approach criticized the interstitial approach for replicating the major flaw of lockstep interpretation: taking federal constitutional law as the presumptively correct baseline from which state constitutional interpretation must proceed.<sup>83</sup> Advocates of the interstitial approach sometimes responded by justifying it as better taking into account the contemporary reality of constitutional protection

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<sup>76</sup> TARR, *supra* note 74, at 183–85.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*; Linde, *E Pluribus*, *supra* note 63, at 180.

<sup>79</sup> TARR, *supra* note 74, at 182–83.

<sup>80</sup> Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 718 (1983); *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1330–31 (1982) [hereinafter *Developments*].

<sup>81</sup> WILLIAMS, *supra* note 64, at 129–30, 146–69.

<sup>82</sup> See, e.g., *State v. Hunt*, 450 A.2d 952, 965–67 (N.J. 1982) (Handler, J., concurring); *State v. Gunwall*, 720 P.2d 808, 811 (Wash. 1986).

<sup>83</sup> WILLIAMS, *supra* note 64, at 169–77.

of individual rights—namely, that the U.S. Constitution has assumed the primary role in protecting such rights, and that state constitutions consequently can bear only a limited, supplemental role without calling into question their legitimacy in the legal order.<sup>84</sup> According to the primacy approach, however, this position is incoherent because state constitutions are not documents the legitimacy of which is or can be called into question; they are positive legal enactments with binding force that must be given effect.<sup>85</sup>

The primacy approach, however, gives rise to equally difficult problems. This method demands that state courts engage the state constitution as an independent source of law by examining its text, its history, its structure, relevant state precedent, the character and values of the people of the state, and prudential considerations relating to the judicial role and the pragmatic consequences of judicial resolution of constitutional questions.<sup>86</sup> Proponents clearly believed that state courts taking this approach would often reach results that differ from those reached by federal courts, and that these results would in consequence be legitimized by their responsiveness to a distinct body of positive law.<sup>87</sup>

Yet how likely is it that careful and independent examination of these factors would really lead a state court construing the state constitution to reach a result significantly different from the result the U.S. Supreme Court might reach under the U.S. Constitution? Consider the constitutional text. In 1790, the text of state and national constitutions often differed significantly.<sup>88</sup> Today, however, textual differences are both less common and less dramatic due to frequent state constitutional amendment and replacement, and the ubiquitous process of language-swapping.<sup>89</sup> What about constitutional history? Even setting aside the obvious fact that constitutional text and constitutional history are hardly independent variables in constitutional interpretation,<sup>90</sup> there are

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<sup>84</sup> Pollock, *supra* note 80, at 717–18; *Developments*, *supra* note 80, at 1357–58.

<sup>85</sup> James A. Gardner, *Whose Constitution Is It? Why Federalism and Constitutional Positivism Don't Mix*, 46 WM. & MARY L. REV. 1245, 1247–49 (2005).

<sup>86</sup> Linde, *E Pluribus*, *supra* note 63, at 181–93. In setting out these elements of constitutional adjudication, Linde relied heavily on PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982).

<sup>87</sup> James A. Gardner, *Introduction*, in 1 *THE DEVELOPMENT OF INDEPENDENT STATE CONSTITUTIONAL LAW* at xxxii (James A. Gardner ed., 1999) [hereinafter Gardner, *Introduction*].

<sup>88</sup> For a discussion of the early state constitutions, see generally WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS* (Rita Kimber & Robert Kimber trans., Rowman & Littlefield Publishers, Inc., expanded ed. 2001) (1980).

<sup>89</sup> James A. Gardner, *Autonomy and Isomorphism: The Unfulfilled Promise of Structural Autonomy in American State Constitutions*, 60 WAYNE L. REV. 31, 36–42, 62–64 (2014) [hereinafter Gardner, *Autonomy*]; TARR, *supra* note 74, at 46–55.

<sup>90</sup> Clearly, textual similarities often reflect parallel similarities in constitutional history. Because constitutional text is drafted in a particular place, at a particular time, in response to particular historical experiences or exigencies, the appearance of the same or similar text in more than one document suggests strongly that the drafters of each document were reacting independently to the same or similar historical events.

good reasons to think that the historical experiences of individual American states differ from the collective historical experiences of the United States only in rare and, in all probability, relatively minor ways. The major episodes of American life—the colonial experience, the Revolution, the frontier, the Civil War and Reconstruction, industrialization, two world wars, the Great Depression, the rise of the social welfare state, the civil rights movement, and so on—are, from the vantage point of the present, collective, shared experiences regardless of how they may have been experienced at the time of their occurrence in different places around the nation. This is not to say that constitutional history might not differ somewhat from state to state, but that the magnitude of any such differences must be greatly reduced through the process by which American historical experience is continually collectivized.<sup>91</sup>

Another problem, this time of a practical nature, also frequently confronted state courts attempting to follow the primacy approach: state courts searching for relevant state constitutional precedent often found none for the simple reason that the law of state constitutional rights was dramatically underdeveloped when Justice Brennan issued his call to pay it greater heed.<sup>92</sup> State courts seeking to interpret their own bills of rights often found that the provisions had literally never been previously construed.<sup>93</sup> In contrast, they often found a highly developed body of federal constitutional law construing textually and historically similar provisions of the U.S. Constitution.<sup>94</sup>

Even more damaging, however, is that the frequent congruity of guideposts to federal and state constitutional interpretation casts doubt on a fundamental premise of Brennan's analysis: that state constitutional law is in fact, rather than merely in theory, jurisprudentially independent of federal constitutional law.<sup>95</sup> If state constitutional law is not as a factual matter jurisprudentially independent of federal constitutional law—if it looks frequently to federal constitutional law not merely for inspiration but as a source of concrete legal doctrine—then the liberty-protecting justifications for treating it as independent disappear. State constitutional law would still retain its potential to serve as an independent and in some cases more generous source of individual liberty than national constitutional law, but this potential would remain unfulfilled due to the fact that constitutional drafters and ratifiers—the people of the states—would have chosen to adopt the federal approach, whatever it may be, for purposes of state constitutional doctrine.<sup>96</sup>

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<sup>91</sup> On the collectivization of historical memory, and its associated politics, *see, e.g.*, DAVID W. BLIGHT, *BEYOND THE BATTLEFIELD: RACE, MEMORY, AND THE AMERICAN CIVIL WAR* (2002), especially at 1–5.

<sup>92</sup> *See* Brennan, *supra* note 2, at 502.

<sup>93</sup> Gardner, *Failed Discourse*, *supra* note 62, at 780–81.

<sup>94</sup> Gardner, *Introduction*, *supra* note 87, at xi–xiv.

<sup>95</sup> *See* Brennan, *supra* note 2, at 501.

<sup>96</sup> Gardner, *Autonomy*, *supra* note 89, at 49–66.



### B. *The Upshot: Little Change in Judicial Practice*

As the dust kicked up by this fierce theoretical debate began to settle during the 1990s, a remarkable fact emerged: relatively little had actually changed. With the exception of a comparatively small proportion of high profile cases, written mostly by a small number of vocal judges on a few state courts, the workaday reality of state constitutional adjudication remained much the same as it had been before Justice Brennan's call to arms and the subsequent response.<sup>97</sup>

State courts did issue many rights-expanding decisions during the decade following Justice Brennan's *Harvard Law Review* article,<sup>98</sup> but they also issued many more in which they refused to construe state constitutions to provide protections for individual rights that exceed federal minima.<sup>99</sup> For every state court that has expanded the scope of constitutional liberties under the state constitution by refusing to follow some rights-contracting ruling of the United States Supreme Court, two or three state courts have followed the federal lead by construing the state constitution to provide precisely the same reduced level of protection as the federal Constitution.<sup>100</sup> For example, although five state courts have expressly rejected the United States Supreme Court's interpretation of the First Amendment under which the public has no free speech rights in privately owned shopping malls,<sup>101</sup> the courts of thirteen states have expressly followed the Supreme Court's lead and construed their state constitutions precisely as the Supreme Court has construed the First Amendment.<sup>102</sup> A 1991 study of state constitutional criminal procedure decisions found that state courts construe their state constitutions in conformity with federal interpretations of the U.S. Constitution in nearly seventy percent of all cases.<sup>103</sup> The same study also categorized states as "rejectionist" if they rejected federal constitutional doctrine in seventy-five percent or more of their independent state constitutional rulings, and "adoptionist" if they adopted federal doctrine in seventy-five percent or more

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<sup>97</sup> Lawrence Friedman, *Path Dependence and the External Constraints on Independent State Constitutionalism*, 115 PENN ST. L. REV. 783, 783 (2011).

<sup>98</sup> Wachtler, *supra* note 10, at 397.

<sup>99</sup> Gardner, *Introduction*, *supra* note 87, at xxvii.

<sup>100</sup> For a more in depth discussion, see *id.*

<sup>101</sup> The federal rule is set out in *Hudgens v. NLRB*, 424 U.S. 507, 507 (1976), and *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 74–75 (1980). This approach was rejected as a matter of state constitutional law in *Bock v. Westminster Mall Co.*, 819 P.2d 55, 55 (Colo. 1991); *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980); *Batchelder v. Allied Stores Int'l*, 445 N.E.2d 590, 595 (Mass. 1983); *N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp.*, 650 A.2d 757, 760 (N.J. 1994); *Alderwood Assocs. v. Wash. Envtl. Council*, 635 P.2d 108, 110 (Wash. 1981).

<sup>102</sup> Cases collected in 1 JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES* § 9.03[1][a] (4th ed. 2006).

<sup>103</sup> Latzer, *supra* note 19, at 192 tbl.1.

of their independent state constitutional decisions.<sup>104</sup> The study found that adoptionist states outnumbered rejectionist states by twenty-two to four.<sup>105</sup> Many of these results were replicated in a 2000 study, which found that between 1970 and 1994 state supreme courts followed the federal analysis in sixty-nine percent of all cases raising an issue of individual liberties.<sup>106</sup>

State courts have also by and large continued their pre-1970s practice of avoiding state constitutional rulings altogether. One study examined state high court decisions handed down between 1981 and 1986 that dealt with the constitutional right against self-incrimination.<sup>107</sup> It found that state courts ruled exclusively on federal constitutional grounds in seventy-eight percent of the cases.<sup>108</sup> Only eight state supreme courts rested their decisions on state constitutional law in as many as half of all self-incrimination cases decided during the study period, whereas fourteen courts did not consult the state constitution in even a single self-incrimination case during the period, and another seventeen state high courts did so exactly once.<sup>109</sup> Moreover, even when state courts do interpret state constitutions, their decisions frequently display many of the qualities that proponents of the primacy approach, and Justice Brennan before them, initially criticized.<sup>110</sup> A study of over 1,200 state constitutional decisions issued by the highest courts of seven states during 1990 found that the great majority of these decisions were characterized by a grudging resort to the state constitution; obscurity as to whether the ruling was based on state or federal constitutional grounds; a tendency to fall into line, without offering any explanation or justification, with federal doctrine developed under the U.S. Constitution; and a complete absence of any discussion of state constitutional history or the intentions of the state constitution's framers.<sup>111</sup> These results were replicated in a more recent study of the decisions of four state courts issued during their 2005–2006 terms.<sup>112</sup>

A few state courts have, not without some fanfare, self-consciously announced themselves adherents of either the primacy or interstitial approach. Yet close observation of the performance of even these courts reveals that they have rarely stuck to their methodological commitments, and have in fact often lapsed into the very kind of lockstep or reactive analysis they so deliberately committed themselves to eschew.<sup>113</sup> In a 2000 article, a judge of Oregon's

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<sup>104</sup> *Id.* at 193.

<sup>105</sup> *Id.*

<sup>106</sup> Cauthen, *supra* note 19, at 1195–96.

<sup>107</sup> Esler, *supra* note 18, at 27.

<sup>108</sup> *Id.* at 28.

<sup>109</sup> *Id.* at 28–29.

<sup>110</sup> Gardner, *Introduction*, *supra* note 87, at xxviii.

<sup>111</sup> Gardner, *Failed Discourse*, *supra* note 62, at 781–94.

<sup>112</sup> Long, *supra* note 66, at 72–86.

<sup>113</sup> Jack L. Landau, *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793, 795 (2000); Dennis J. Braithwaite, *An Analysis of the "Divergence Factors": A Misguided Approach to Search and Seizure Jurisprudence Under the New Jersey Constitution*, 33 RUTGERS L.J. 1, 4 (2001).

intermediate appellate court argued candidly that “although selected Oregon decisions employ some interesting rhetoric about constitutional interpretation,” a close examination of the decisions demonstrates that the Oregon Supreme Court’s self-conscious methodological commitment to the primacy approach “appears to have made little difference other than to provide the courts an opportunity to arrive at different results than the application of federal law would otherwise require.”<sup>114</sup>

Thus, by far the most serious mark against Brennan’s analysis, and the primacy approach to state constitutional interpretation it inspired, is that state judges so rarely seem interested in following it.<sup>115</sup> Indeed, they seem uninterested in following it not only when the relevant interpretational guideposts all point toward doctrinal convergence, but even when they do not—when the constitutional text differs from its federal counterpart; when the state constitutional history contains episodes suggesting that it might differ materially from the national historical experience; when prior, not to say ancient, state decisions construing the state constitution may give reason to think that prevailing federal doctrine may be irrelevant.<sup>116</sup> Instead, whether by lockstep adoption or by rejectionist disagreement, state judges behave continually as though one of their principal functions when construing their state constitution is to pass judgment on decisions of the U.S. Supreme Court construing the national Constitution—to serve, that is, as supporters or opponents of federal judicial rulings. This is a practice, of course, that only reinforces the view, associated with Brennan’s original critics, that aggressively rights-protective interpretations of state constitutional provisions are little more than the illicit expression by state judges of ideological opposition to rulings of the U.S. Supreme Court.

Even taken individually, but certainly when taken together, these results call into question the theoretical premises of Brennan and his followers. Certainly the theory fails to provide a good description of what state courts actually do. Prescriptively, Brennan urged state courts to do something—interpret state constitutions to expand state protection for individual rights beyond the level provided by the U.S. Constitution—that they are obviously disinclined to do. At the same time, Brennan’s account tells state courts that the one thing they most consistently do when interpreting state constitutions—construe them in lockstep with the U.S. Constitution—represents a rudimentary error. Something clearly is wrong with this picture.

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<sup>114</sup> Landau, *supra* note 113, at 795–96.

<sup>115</sup> Long, *supra* note 66, at 42; Friedman, *supra* note 97, at 783.

<sup>116</sup> Jeffrey S. Sutton, *What Does—And Does Not—Ail State Constitutional Law*, 59 KAN. L. REV. 687, 707 (2011).

#### IV. SUBNATIONAL CONSTITUTIONAL LAW AND RIGHTS FEDERALISM

In my view, the principal flaw in Justice Brennan's famous article, and in the judicial and academic theorizing that followed it, is that it ignores the shared setting in which state and federal constitutional law are deeply and mutually embedded. Both levels of constitutional law function as distinct, yet at the same time profoundly interconnected, parts of a federal system. Federalism does more than merely carve out separate spheres of self-sovereignty for state and national governments; it also binds them together in a shared system of mutual dependency and shared operational mission. As a result, state and federal constitutions are not and cannot be completely independent sources of positive law. Rather, they are interlocking parts of a larger system in which they operate partly in concert and partly in opposition, depending upon a great number of highly contingent factors. Justice Brennan's call to arms was thus built around a significantly incomplete view of state constitutional law: he saw the independence, but overlooked the interdependence; he saw human rights protections, but missed the phenomenon of human rights federalism.

##### A. *Basic Principles of Federalism*

In the basic Madisonian model to which Americans are heirs, the purpose of federalism is clear: to protect liberty.<sup>117</sup> "The accumulation of all powers . . . in the same hands," wrote Madison, "may justly be pronounced the very definition of tyranny."<sup>118</sup> To protect liberty, power must therefore be divided.<sup>119</sup> Federalism serves this principle of American constitutional design by parceling out government powers among different levels of government, and by giving each level of government, state and national, substantial powers sufficient to allow each to monitor and check the abuses of the other.<sup>120</sup> In this scheme, Madison, wrote, "a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."<sup>121</sup> In all but the smallest polities, self-governance can proceed only by the delegation of popular power to an agent—a government.<sup>122</sup> One of the great innovations of the American federal system is that the people have secured their own self-interest by dividing power to create two distinct governmental agents.

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<sup>117</sup> See THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

<sup>118</sup> THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

<sup>119</sup> See THE FEDERALIST NO. 51, *supra* note 117, at 322.

<sup>120</sup> See James A. Gardner, *State Courts as Agents of Federalism: Power and Interpretation in State Constitutional Law*, 44 WM. & MARY L. REV. 1725, 1728–29, 1734–40 (2003) [hereinafter Gardner, *State Courts*].

<sup>121</sup> THE FEDERALIST NO. 51, *supra* note 117, at 323.

<sup>122</sup> See Gardner, *State Courts*, *supra* note 120, at 1734–35.

Principals frequently employ multiple agents for different purposes. Lord Grantham of the popular British television series *Downton Abbey* (PBS), for example, had his butler, his valet, his footman, his chambermaids, his cook, his chauffeur, and so forth, and each of these agents performed a very different and highly circumscribed task. American federalism, however, takes a different approach. The two agents in the system—the state and national governments—are charged not with pursuing distinct goals, but with pursuing largely the *same* set of goals, and each does so independently, under an independent delegation of authority.<sup>123</sup> It is not only the national government that is charged to “promote the general welfare.”<sup>124</sup> State governments have the same charge.<sup>125</sup>

The “double security” of which Madison spoke, then, does not arise so much from some complicated scheme of complementary powers, as is often supposed,<sup>126</sup> but from a conceptually much simpler arrangement in which the state and national governments independently police much of the same turf.<sup>127</sup> Of course the overlap of mission is not complete; each level of government has exclusive or dominant authority in some spheres of public action.<sup>128</sup> Still, most of the important powers held by each level of government are concurrent,<sup>129</sup> allowing state and national authorities to occupy, and indeed to compete with one another in, the most important realms of public affairs.<sup>130</sup>

This overlap of authority is essential to the success of the constitutional plan. As Madison explained, “the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”<sup>131</sup> A successful and sustainable separation of powers through mutual checking, Madison argued, thus requires not complete separation of powers—an arrangement

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<sup>123</sup> THE FEDERALIST NO. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961).

<sup>124</sup> U.S. CONST. pmbl.

<sup>125</sup> See, e.g., OHIO CONST. pmbl. (“promote our common welfare”).

<sup>126</sup> This view typically rests on an old, now largely discredited model of “dual federalism.” See ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM 35–36 (2009).

<sup>127</sup> Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1427–28 (1987); Martin Landau, *Federalism, Redundancy and System Reliability*, 3 PUBLIUS 173, 173–74 (1973); Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 498 (1991); THOMAS R. DYE, AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS 6–7 (1990); Todd E. Pettys, *Competing for the People’s Affection: Federalism’s Forgotten Marketplace*, 56 VAND. L. REV. 329, 332–33 (2003).

<sup>128</sup> For example, the national government retains paramount power in military and foreign affairs. State power is dominant, though not exclusive, in traditional areas of law such as tort, contract, property, and family law.

<sup>129</sup> The preeminent example is the power to regulate economic affairs, i.e., “commerce.” U.S. CONST. art. I, § 8, cl. 3.

<sup>130</sup> For an overview of the theory of “competitive federalism,” see, for example, DYE, *supra* note 127, at 1–33.

<sup>131</sup> THE FEDERALIST NO. 51, *supra* note 117, at 321–22.

Madison referred to disparagingly as “parchment barriers”<sup>132</sup>—but significant overlap among them.<sup>133</sup> It is only in virtue of the possession by each agent of some share of control over the same fields of action that each agent obtains the “constitutional means . . . to resist encroachments of the others.”<sup>134</sup> Dual policing of the same territory is thus the feature of constitutional design that enables each level of government not merely to monitor the behavior of the other, but to attempt, and sometimes to succeed, in checking and counteracting its abuses.<sup>135</sup>

This structure is in many respects little different from a variety of commonplace arrangements in which a principal does not quite trust its agent, and so brings in a second agent to monitor the first one. A homeowner, for example, might hire a general contractor to undertake a large construction project, but might at the same time employ an inspector to check the contractor’s work to make sure it is of the type and quality contracted for. A corporation or other organization might delegate or outsource some significant task, but also employ an auditor to make sure it is billed accurately and honestly. Congress charges government agencies with carrying out legislative instructions, but also creates in many agencies an inspector general’s office to monitor agency performance. Federalism contemplates a similar arrangement for similar reasons: the delegation to government of the people’s power to govern themselves is an action fraught with risk, and an arrangement of dual agency provides additional assurances that the work will be done to the principal’s satisfaction.

### B. *State Constitutions in a Federal System*

In its creation of the system of federalism, and its specification of the authority of the national government, the U.S. Constitution establishes a critically important piece of the constitutional architecture of dual, mutually checking governmental agents. It does not, however, establish the entirety of that architecture; state constitutions also play an indispensable role in constructing the federal system.

State constitutions do for state power what the U.S. Constitution does for national power: they structure and allocate it and establish the purposes for which it may—and may not—be used.<sup>136</sup> In a federal system like ours, state

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<sup>132</sup> THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

<sup>133</sup> THE FEDERALIST NO. 47 (James Madison).

<sup>134</sup> THE FEDERALIST NO. 51, *supra* note 117, at 321–22.

<sup>135</sup> *See id.* at 322.

<sup>136</sup> Regarding the functions of constitutions generally, *see* EDWARD SCHNEIER, CRAFTING CONSTITUTIONAL DEMOCRACIES: THE POLITICS OF INSTITUTIONAL DESIGN 2–3 (2006); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 412, 415–16 (2007); Jeremy Waldron, *Constitutionalism: A Skeptical View*, in CONTEMPORARY DEBATES IN POLITICAL PHILOSOPHY 273–74 (Thomas Christiano & John Christman eds., 2009). Regarding state constitutions in particular, *see* Jonathan L.

constitutions thus perform three principal functions. First, they create a state government and invest it with the powers necessary to accomplish the goals for which the people of the state create a government—“to secure and perpetuate [the] blessings [of freedom]”;<sup>137</sup> “to provide for the health, safety and welfare of the people”;<sup>138</sup> to “insure justice to all, preserve peace, promote the interest and happiness of the citizen and of the family, and transmit to posterity the enjoyment of liberty.”<sup>139</sup> State constitutions consequently grant state governments extensive authority to regulate public and private affairs and to raise and spend money to fund beneficial programs.<sup>140</sup>

Second, like the U.S. Constitution, state constitutions impose restraints on the exercise of granted governmental powers so that the state government, an agent charged with pursuing the goals of the state populace, does not turn on its own principal.<sup>141</sup> Thus, state constitutions universally contain a host of well-established devices for limiting governmental power.<sup>142</sup> Such devices typically include a formal horizontal separation of powers, procedural prerequisites for the use of state power, and substantive limits on the scope of state power. Substantive limits may inhere in internal limitations on the scope of granted powers,<sup>143</sup> or they may be imposed through specific restrictions on the purposes for which state power may be deployed,<sup>144</sup> or through the inclusion of a bill of rights, a feature found in every state constitution.

Third, because they are embedded in a federal system, state constitutions grant an additional form of power to state governments: the power to resist and check abuses of national power.<sup>145</sup> In the Madisonian model, as we have seen, a functioning federal system is one in which “the different governments will control each other, at the same time that each will be controlled by itself.” The U.S. Constitution serves this imperative by authorizing the national government to deploy its powers to monitor and check abuses of state authority.<sup>146</sup> The national government has frequently deployed many of its powers in just this way. Federal courts, for example, have often used the power of judicial review to invalidate state laws that transgress federal

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Marshfield, *Models of Subnational Constitutionalism*, 115 PENN. ST. L. REV. 1151, 1158–64 (2011).

<sup>137</sup> CAL. CONST. pmbl.

<sup>138</sup> ILL. CONST. pmbl.

<sup>139</sup> GA. CONST. pmbl.

<sup>140</sup> In fact, the standard presumption under state constitutions is that they grant state government plenary power except as limited—the opposite of the presumption that generally applies to the U.S. Constitution. WILLIAMS, *supra* note 64, at 249–50.

<sup>141</sup> ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 213, 243, 312 (2000); GEOFFREY BRENNAN & ALAN HAMLIN, *DEMOCRATIC DEVICES AND DESIRES* 99–104, 118–21 (2000).

<sup>142</sup> See GARDNER, *supra* note \*, at 87–100.

<sup>143</sup> WILLIAMS, *supra* note 64, at 253–57.

<sup>144</sup> TARR, *supra* note 74, at 118–21.

<sup>145</sup> See *id.* at 11–15.

<sup>146</sup> GARDNER, *supra* note \*, at 84–87.

constitutional boundaries.<sup>147</sup> Congress has used its power to enforce the Fourteenth and Fifteenth Amendments to enact civil rights legislation that powerfully constrains the way states may treat their own citizens.<sup>148</sup> And Congress has often used its power to spend money to encourage state behavior that it thinks beneficial to the American public.<sup>149</sup>

A well-functioning federal system, however, demands that monitoring and checking occur from both directions, from below as well as from above. It follows, then, that states must possess a reciprocal authority to monitor and check abuses of national power. Since state constitutions are the foundational sources from which state governments derive their powers, state constitutions necessarily must authorize states to deploy their powers so as to resist what they believe to be national encroachments on public welfare.<sup>150</sup>

I have elsewhere described in some detail the tools and methods that American states, consistent with the Madisonian model, have from time to time deployed to resist exercises of national power with which they disagree.<sup>151</sup> These include techniques deployed in advance to influence the final content of national policy decisions, such as harnessing the state's congressional delegation, lobbying, and mobilization of public opinion.<sup>152</sup> States also have many tools at their disposal to undermine or blunt the impact of enacted national policies they view as inimical to the public welfare. These include the use of affirmatively granted state power to seize the initiative in policy making, refusal of spending incentives, uncooperative implementation of national policy, administrative negotiation, and litigation, as well as stronger (if not always fully legal) measures such as outright defiance of national authority.<sup>153</sup>

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<sup>147</sup> For example, in the last Term the Court invalidated state laws in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2588 (2015) (state refusal to recognize gay marriage); and *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2222 (2015) (anti-sign ordinance).

<sup>148</sup> Most notably, the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964), and the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (1965).

<sup>149</sup> Most large-scale social welfare programs work this way, such as food stamps, unemployment insurance and, most recently, the Affordable Care Act.

<sup>150</sup> GARDNER, *supra* note \*, at 87–88.

<sup>151</sup> *Id.* at 88–120. For a comparative analysis, see generally James A. Gardner & Antoni Abad I Ninet, *Sustainable Decentralization: Power, Extraconstitutional Influence, and Subnational Symmetry in the United States and Spain*, 59 AM. J. COMP. L. 491 (2011).

<sup>152</sup> For discussion of state mobilization of the congressional delegation and lobbying, see, e.g., DONALD H. HAIDER, *WHEN GOVERNMENTS COME TO WASHINGTON: GOVERNORS, MAYORS, AND INTERGOVERNMENTAL LOBBYING* (1974); ANNE MARIE CAMMISA, *GOVERNMENTS AS INTEREST GROUPS: INTERGOVERNMENTAL LOBBYING AND THE FEDERAL SYSTEM* (1995). For discussion of state mobilization of public opinion, see, for example, John Dinan, *Shaping Health Reform: State Government Influence in the Patient Protection and Affordable Care Act*, 41 PUBLIUS 395, 404 (2011); and JOHN D. NUGENT, *SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING* 74 (2009).

<sup>153</sup> For specific examples, see NUGENT, *supra* note 152, at 67 (seizing the initiative); Donn Tibbetts, *Lift Seat-Belt Sanctions, Merrill Urges DOT Chief*, N.H. UNION LEADER,



The point is this. The system of federalism established by the U.S. Constitution protects liberty and furthers the people's collective goals by institutionalizing a kind of permanent conflict between the national and subnational levels of government.<sup>154</sup> Federalism creates a system of dual agency; charges both agents to pursue independently an identical, or at the very least significantly overlapping, set of goals; and then settles on each agent the additional burden of making sure the other agent stays on task.<sup>155</sup> Because the state and national governments pursue largely the same set of popular goals, the range of this contestatory dynamic is not limited to any particular domain; on the contrary, it is capable of extending across the entire landscape of possible governmental action. State–national conflict might thus emerge in any arena of policy or public endeavor. We might, for example, observe a form of environmental federalism, in which the state and national levels engage in conflict over the goals or implementation of environmental policy. We might similarly observe conflict in the form of education federalism,<sup>156</sup> immigration federalism,<sup>157</sup> or foreign policy federalism.<sup>158</sup>

### C. Human Rights Federalism

The force of Justice Brennan's *Harvard Law Review* article was its startling insight—a correct one—that the field of human rights protection could itself be an arena in which the state and national governments might struggle over the content and scope of the American commitment to observe

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Jan. 28, 1995, at A1 (refusal of spending incentives); Timothy Egan, *Speeding Is Easy (and Almost Free) in Montana*, N.Y. TIMES, July 10, 1989, at A14 (uncooperative implementation); ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN 281–90 (2011) (negotiation); Dinan, *supra* note 152, at 405–06 (litigation); and Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1278–79 (2009) (defiance).

<sup>154</sup> Thomas Schwartz, *Publius and Public Choice*, in THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM 35 (Bernard Grofman & Donald Wittman eds., 1989); Peter C. Ordeshook, *Some Rules of Constitutional Design*, in LIBERALISM AND THE ECONOMIC ORDER 204 (Ellen Frankel Paul et al. eds., 1993); ADRIAN VERMEULE, THE SYSTEM OF THE CONSTITUTION 3 (2011).

<sup>155</sup> See THE FEDERALIST NO. 46, *supra* note 123, at 294.

<sup>156</sup> Roderick M. Hills, Jr., *The Case for Educational Federalism: Protecting Educational Policy from the National Government's Diseconomies of Scale*, 87 NOTRE DAME L. REV. 1941, 1941 (2012); Heather K. Gerken, *Federalism and Nationalism: Time for a Détente?*, 59 ST. LOUIS U. L.J. 997, 1015–18 (2015).

<sup>157</sup> See generally Rick Su, *The Role of States in the National Conversation on Immigration*, in STRANGE NEIGHBORS: THE ROLE OF STATES IN IMMIGRATION POLICY (Carissa Byrne Hessick & Gabriel J. Chin eds., 2014); Christina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008).

<sup>158</sup> Peter J. Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 567, 567–68 (1997); Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 342–43 (1999).

and respect the rights and dignity of individuals. The protection of human rights is not something that the architecture of federalism assigns exclusively to the national level; it is, on the contrary, a shared function, to be pursued simultaneously at both levels through the identification and active policing of such rights.<sup>159</sup> As Brennan observed, the federal Bill of Rights is hardly the only such document in our system. It is, to be sure, the nation's most celebrated bill of rights, but every state has independently entered the field of rights protection by enacting and constitutionalizing its own bill of rights.

As a result, the proper scope of protection for human rights can be a subject of disagreement and contention among the orders of government. It should by no means be assumed that all fifty states and the national government agree completely on the scope of protection to be accorded to each and every human right receiving the dual protection of the state and national constitutions. In accordance with the federal dynamics of intergovernmental contestation, whenever any such disagreement appears, each order of government can be expected to use the resources at its disposal to advance its own view of the appropriate level of protection, and to resist what it views as misguided decisions about rights protection advanced by its competitor. It was this vision that so excited Brennan's supporters.

What Justice Brennan failed to perceive, however, was that federalism's assignment of responsibility for protecting individual rights to both orders of government says nothing about the likelihood of disagreement among them, much less that the disagreement might run in any particular direction. The federal system of dual agency requires each agent continually to examine and to judge the actions of the other. If such a system is to succeed in its goal of keeping both agents on track in implementing the wishes of their common principal, then each must exercise independent judgment about what fulfillment of those wishes requires in any particular instance. Thus, in the arena of human rights protection, each agent must decide for itself what balance between government empowerment and constraint best conduces to public welfare. There is no *a priori* outcome of this deliberative task. It is in principle just as possible—and just as permissible—for states to conclude that the national government has done a commendable job in striking the balance between individual rights and government power as it is for states to conclude that the national government has done a poor job, either by according too little protection to human rights or, indeed, too much.

This is where Justice Brennan missed the mark. He assumed that the lack of aggressively independent state judicial deployment of state constitutional rights, and the proliferation of lockstep state supreme court opinions, indicated

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<sup>159</sup>Originally, the only direct protection for human rights was provided by state constitutions; the U.S. Constitution as adopted did not initially have a bill of rights. When in 1791 the federal Bill of Rights was adopted, it applied solely to the federal government. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 243 (1833). Adoption of the Fourteenth Amendment altered the landscape by intermingling rights protection at each level of government.

a lack of appreciation by state judges of the nature of state constitutional independence. But there is another explanation. Although federalism creates the conditions in which disagreement among the orders of government may appear and become an object of active conflict, there is nothing inevitable about the emergence of such disagreement. It is no more inevitable that states disagree with the national government over policies of free speech, freedom of religion, or warrantless searches than it is that they disagree over the details of policies concerning environmental protection, immigration, or economic development. And even when one state disagrees with national policy, there is no reason to assume that other states will share that disagreement, or that disaffection on the state level will spread like a contagion. After all, the very first attempt in American history to build a state-level movement against a controversial national human rights policy—public protests by Virginia and Kentucky of press censorship by the John Adams administration<sup>160</sup>—died on the vine when a disposition to resist remain confined to those two states.

It follows that the predominance of lockstep interpretation by state supreme courts construing state constitutional rights provisions could just as well reflect a very different dynamic in which (1) states conscientiously monitor the performance of the national government in the field of human rights protection; (2) state supreme courts by and large approve of that performance; and (3) when state courts find it necessary to construe rights provisions of their state constitutions, they simply adopt approaches developed at the national level that they find satisfactory.<sup>161</sup>

If anything, agreement at the state and national levels about the appropriate level of rights protection is likely to be far more common than disagreement, just as it is in other policy domains. The state and national governments are agents of a single national polity organized for various purposes into different subnational groupings. National policies toward human rights are in the long run likely to reflect nationwide trends in public opinion, trends from which individual state polities are hardly immune, and to which they in fact contribute. Public opinion at the state and national levels, that is to say, may frequently coincide—not always, and rarely uniformly across all the states, but often enough to make state adoption of national policies a commonplace occurrence.<sup>162</sup>

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<sup>160</sup> THE VIRGINIA AND KENTUCKY RESOLUTIONS OF 1798 AND '99, at 5–6, 19–21 (Jonathan Elliot ed., 1832).

<sup>161</sup> For further elaboration, see GARDNER, *supra* note \*, at 196–97, 225–26, 243–44, 253–57.

<sup>162</sup> As V.O. Key, Jr. wrote nearly sixty years ago, “[T]he American states operate not as independent and autonomous political entities, but as units of the nation.” Consequently, “public attention cannot be focussed sharply on state affairs undistracted by extraneous factors; political divisions cannot occur freely on state questions alone: national issues, national campaigns, and national parties project themselves into the affairs of the states.” V.O. KEY, JR., *AMERICAN STATE POLITICS: AN INTRODUCTION* 18 (1956). On the relationship between state and national politics, see generally James A. Gardner, *The Myth*

Indeed, congruity of state and national policy preferences is especially likely in the U.S. federal system for two related reasons. First, the major ideological cleavages in the United States tend not to be territorial, but partisan.<sup>163</sup> Second, political parties in the United States typically display a strong degree of vertical integration, meaning that the policy commitments of Democrats and Republicans at the national party level tend to be similar to the commitments held their by their state-level affiliates.<sup>164</sup>

Taken together, these two facts mean that differences of opinion, even very strong ones, may exist in the United States, but that the contestants are rarely divided by geographical boundaries. Instead, differences of opinion are far more likely to exist within every state, as on the national level, and to be organized by partisan affiliation.<sup>165</sup> The major cleavages in public opinion therefore rarely pit some distinctive local opinion in Nebraska or Pennsylvania against a very different nationwide opinion; rather, they tend to pit Democrats and Republicans against each other at both the state and national levels.<sup>166</sup> When the party out of favor at the national level controls a state, the conditions are present for state-national conflict, but the frontier of conflict will likely be defined by the ideological commitments of the respective parties, not the territorially organized polities.<sup>167</sup> By the same token, when the same political party controls the national government and the government of a state, there is likely to be a good deal of congruity of policy preference. In these circumstances, we can hardly be surprised to see a state supreme court marching in lockstep with the U.S. Supreme Court, even when the policies in question concern the scope of protection for human rights.

Of course, these are tendencies, not ironclad laws, and it is certainly possible for a state's constitutional jurisprudence of human rights to be thoroughly independent of national jurisprudence. Yet even in those circumstances, the fact that a state court exercises independent judgment about the appropriate level of human rights protection in the United States says nothing about either the substance of that judgment, or how it will be expressed at the doctrinal level. If the state court, in the exercise of its

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*of State Autonomy: Federalism, Political Parties, and the National Colonization of State Politics*, 29 J.L. & POL. 1, 3 (2013) [hereinafter Gardner, *Myth*].

<sup>163</sup> Gardner, *Myth*, *supra* note 162, at 24–28; Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1108–22 (2014).

<sup>164</sup> On the integration of state and national parties, see, for example, John F. Bibby, *Party Networks: National-State Integration, Allied Groups, and Issue Activists*, in *THE STATE OF THE PARTIES* 69–85 (John C. Green & Daniel M. Shea eds., 3d ed. 1999). On the similarity of national and state party policy commitments as evidenced in campaign platforms, see Gardner, *Myth*, *supra* note 162, at 32–36. On the degree of similarity of party positions across states and with respect to the national parties, see generally Stephen Ansolabehere et al., *Candidate Positioning in U.S. House Elections*, 45 AM. J. POL. SCI. 136, 136–37 (2001); ROBERT S. ERIKSON et al., *STATEHOUSE DEMOCRACY* vii (1993).

<sup>165</sup> Bulman-Pozen, *supra* note 163, at 1108–22.

<sup>166</sup> *Id.* at 1122–30.

<sup>167</sup> *Id.* at 1116–22.

independent judgment, finds that the U.S. Supreme Court is doing an inspired job protecting rights, that judgment might very well result in a convergence of constitutional doctrine. If a state court finds the U.S. Supreme Court's work wanting, it might disagree in either an upward or downward direction from the national baseline; it might, that is, conclude that the national government is striking a poor balance between collective power and individual liberty by providing either too little or too much protection for human rights.

In those cases, the state jurisprudence might correspondingly set the level of protection at a higher level, as Justice Brennan urged, but it is equally possible that the state court could decide that national protection for rights is too high, and set the state bar lower. As the Oregon Court of Appeals has observed, "[i]ndependent development of the law under [the Oregon Constitution] can lead to situations in which that law is *less* protective than is the law under [the U.S. Constitution]."<sup>168</sup> Similarly, the Texas Court of Criminal Appeals has noted that the supremacy of federal constitutional law "does not mean that the Texas Constitution has no ceilings that are lower than those of the federal constitution," and that "[t]he ceiling of one may be lower than the floor of the other."<sup>169</sup>

Of course state courts in practice lack the power to *implement* any downward divergence from the national baseline of rights protection by operation of the incorporation doctrine and the Supremacy Clause, but that does not mean that such judgments by state courts are without effect. This kind of disagreement can be meaningful in the long run through the interactive process of dialogic engagement characteristic of judicial federalism. In this process, state and federal courts influence each other's interpretations of law through a pattern of continuous public conversation conducted through judicial rulings and opinions.<sup>170</sup>

In some of the best-known instances, state supreme courts have influenced the U.S. Supreme Court to *increase* the level of national rights protection by taking highly rights-protective positions as a matter of state law. For example, the embrace of the exclusionary rule by state courts during the 1940s and 1950s influenced the U.S. Supreme Court in 1961 to reverse itself and adopt the exclusionary rule as a remedy for searches by state law enforcement officials that violated the Fourth Amendment.<sup>171</sup> More recently, state rulings

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<sup>168</sup> *State v. Stoudamire*, 108 P.3d 615, 619 (Or. Ct. App. 2005) (per curiam) (Armstrong, J., concurring).

<sup>169</sup> *Hulit v. State*, 982 S.W.2d 431, 437 (Tex. Crim. App. 1998).

<sup>170</sup> Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1147–48 (1993); Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 95–97 (2000); SCHAPIRO, *supra* note 126, at 99–101; Sager, *supra* note 66, at 16–19; Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 249–50 (2001).

<sup>171</sup> *Mapp v. Ohio*, 367 U.S. 643, 657, 660 (1961), *rev'g Wolf v. Colorado*, 338 U.S. 25 (1949).

interpreting state constitutions to prohibit discrimination against gays and lesbians—and in so doing deliberately rejecting federal constitutional law to the contrary—were instrumental in influencing the U.S. Supreme Court to reverse itself in *Lawrence v. Texas* and hold that the U.S. Constitution prohibits criminal punishment of gay sex.<sup>172</sup>

But, as in other arenas of intergovernmental relations, state influence can work in the other direction as well—rulings by state supreme courts can persuade the U.S. Supreme Court to *lower*, or perhaps more commonly to decline to increase, levels of rights protection afforded by the U.S. Constitution. For example, in deciding whether a warrantless search of an office incident to an arrest made there was reasonable under the Fourth Amendment, the Court looked for guidance to state constitutional law:

When construing state safeguards similar to the Fourth Amendment of the Federal Constitution, states courts have shown little hesitancy in holding that incident to a lawful arrest upon premises within the control of the arrested person, a search of the premises at least to the extent conducted in the instant case is not unreasonable.<sup>173</sup>

Similarly, a history of stingy rights protection in the states can influence the U.S. Supreme Court to set the level of protection afforded by the U.S. Constitution at a comparably stingy level. In *Atwater v. City of Lago Vista*, for instance, the Court found it significant that practice under state constitutions of the founding era, which had provided models for the Fourth Amendment, supported a broad interpretation of state authority under the U.S. Constitution to make warrantless arrests on misdemeanor charges.<sup>174</sup>

## V. CONCLUSION

Justice Brennan's 1977 *Harvard Law Review* article is justly celebrated for the attention it drew to the independence of state constitutional law and to

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<sup>172</sup> *Lawrence v. Texas*, 539 U.S. 558, 558–59 (2003), *rev'g* *Bowers v. Hardwick*, 478 U.S. 186 (1986). This story is set out in greater detail in James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1033–37, 1042–43 (2003).

<sup>173</sup> *United States v. Rabinowitz*, 339 U.S. 56, 63 n.5 (1950), *rev'd on other grounds*, *Chimel v. California*, 395 U.S. 752 (1969).

<sup>174</sup> *Atwater v. City of Lago Vista*, 532 U.S. 318, 339–41 (2001) (relying in part on state interpretations of state constitutional search-and-seizure provisions to conclude that warrantless misdemeanor arrests by state police do not violate the Fourth Amendment). Of course, this is in addition to a much more commonplace way in which state courts influence the Supreme Court to contract rights protections: through stingy interpretations of *federal* constitutional law. For a recent example, see *Heien v. North Carolina*, 135 S. Ct. 530, 532 (2014), in which the North Carolina Supreme Court held that the Fourth Amendment does not require suppression of evidence seized during a search incident to an arrest based on a mistake of law by the arresting officer, and the U.S. Supreme Court affirmed.

the potential of this body of law to carry forward the rights revolution initiated by the Warren Court. But the article's more important legacy is the spotlight it threw on the previously overlooked phenomenon of human rights federalism. Brennan's article, it is true, initially sowed jurisprudential confusion through its inattention to the large-scale constitutional structures, practical ground-level mechanisms, and official incentives that shape this important arena of intergovernmental contestation. Nevertheless, it is clear in retrospect that Brennan's article sparked a vigorous public debate about the appropriate role of the state and national governments in the protection of human rights, a debate that at that time seemed to have been settled in favor of national power. In so doing, Brennan provided an important public service that has stimulated useful advances in public and legal understandings of the significance of federalism in the field of human rights protection.

Justice Brennan's article did not summon into existence the system he envisioned, in which state courts bravely and single-mindedly resist and countermand every retreat on human rights protection effectuated by the U.S. Supreme Court. We do, however, have a much more subtle and responsive system in which state courts monitor the performance of the federal judiciary and express their approval or disapproval of federal performance in the course of adjudicating human rights claims under state constitutions. In so doing, state courts join the federal bench in a crucial, ongoing conversation about human dignity and the appropriate ways for governments to respect it.